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No. 02-722

IN THE

Supreme Court of the United States

AMERICAN INSURANCE ASSOCIATION, ET AL.,
Petitioners,

v.

JOHN GARAMENDI, IN HIS CAPACITY AS COMMISSIONER OF INSURANCE FOR THE STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION OF MITSUBISHI MATERIALS CORPORATION ET AL. FOR LEAVE TO FILE AND BRIEF AMICI CURIAE IN SUPPORT OF PETITIONERS

WALTER DELLINGER
(Counsel of Record)
JOHN H. BEISNER
JOHN B. NIBLOCK
PAMMELA QUINN*
O'MELVENY & MYERS LLP
555 13th Street, N.W.
WASHINGTON, D.C. 20004
(202) 383-5300
*Admitted in Virginia only
Counsel for Mitsubishi Materials Corporation and Mitsubishi Materials (U.S.A.) Corporation

(Additional counsel listed on inside cover)

42 pp

DAVID M. BALABANIAN
BINGHAM MCCUTCHEN LLP
Three Embarcadero Center
SAN FRANCISCO, CA 94111
(415) 393-2000
Counsel for Mitsui & Co. Ltd. and Mitsui & Co. (U.S.A.), Inc.

NATHAN LANE III
JOSEPH A. MECKES
SQUIRE, SANDERS & DEMPSEY LLP
One Maritime Plaza, Suite 300
SAN FRANCISCO, CA 94111
(415) 954-0200
Counsel for Ishihara Sangyo Kaisha, Ltd. and Mitsui Engineering & Shipbuilding Co., Ltd.

KATHRYN DAVIS
MORRISON & FOERSTER LLP
425 Market Street
SAN FRANCISCO, CA 94107
(415) 268-7000
Counsel for Isikawajima-Harima Heavy Industries Co., Ltd. and IHI, Inc.

ARNE D. WAGNER
MORRISON & FOERSTER LLP
425 Market Street
SAN FRANCISCO, CA 94107
(415) 268-7000
Counsel for Mitsubishi Corporation and Mitsubishi International Corporation

MARGARET K. PFEIFFER
STACY R. STOLLER
SULLIVAN & CROMWELL LLP
125 Broad Street
NEW YORK, NY 10004
(212) 558-4000
Counsel for Nippon Steel Corporation and Nippon Steel Trading Co. Ltd.

PAUL J. HALL
ERIK K. LARSON
NIXON PEABODY LLP
Two Embarcadero Center, 27th Fl.
SAN FRANCISCO, CA 94111
(415) 984-8200
Counsel for Mitsui O.S.K. Lines, Ltd.

JUNJI MASUDA
MASUDA & EJIRI
399 Park Avenue, 18th Fl.
NEW YORK, NY 10022
(212) 486-2525
Counsel for Japan Energy Corporation, Irvine Scientific Sales Co., Inc., and Japan Energy U.S.A.

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Mitsubishi Materials Corporation, Mitsubishi Materials U.S.A. Corporation, Irvine Scientific Sales Co., Inc., Ishihara Sangyo Kaisha Ltd., Ishikawajima-Harima Heavy Industries Co., Ltd., IHI, Inc., Japan Energy Corporation, Japan Energy U.S.A., Mitsubishi Corporation, Mitsubishi International Corporation, Mitsui & Co., Ltd., Mitsui & Co. (U.S.A.), Inc., Mitsui Engineering and Shipbuilding Co., Ltd., Mitsui O.S.K. Lines, Ltd., Nippon Steel Corporation, and Nippon

Steel U.S.A., Inc., move, pursuant to Rule 37.2, for leave to file the attached brief *amici curiae* in support of petitioners in this case. While the petitioners have consented to the filing of this brief, respondent Insurance Commissioner John Garamendi has not consented. Correspondence reflecting the consent of the petitioners has been lodged with the Court.

Mitsubishi Materials Corporation is a Japanese corporation that produces a variety of products, including cement, aluminum beverage cans, copper, and electronic components. Mitsubishi Materials U.S.A. Corporation, a California corporation, is a wholly owned subsidiary of Mitsubishi Materials Corporation. Mitsubishi Materials U.S.A. Corporation is primarily engaged in the sale of fabricated metal products, machine tools and accessories, and cutting tools in the United States and Canada.

Ishihara Sangyo Kaisha Ltd. is a Japanese corporation engaged in the production and marketing of industrial chemicals, including primarily titanium dioxide pigments, and biosciences products.

Ishikawajima-Harima Heavy Industries Co., Ltd., is a Japanese corporation that provides technology-oriented products and services to the industrial, private, and public sectors, including manufacturing equipment, bridge construction, and environmental control systems. IHI, Inc., a Delaware corporation, is a wholly owned subsidiary of Ishikawajima-Harima Heavy Industries Co., Ltd. IHI, Inc. is engaged in sales and repair services related to Ishikawajima-Harima Heavy Industries Co., Ltd.'s products.

Japan Energy Corporation is a Japanese corporation, which is engaged primarily in the business of refining and processing petroleum, and the sale of petroleum products and electronic materials. Irvine Scientific Sales Co., Inc. is a California corporation and is a wholly owned subsidiary of Japan Energy Corporation. Its main business is manufacturing and selling cell culture products and cytogenetics and diagnostic products. Japan Energy U.S.A. is a Delaware corporation and a wholly owned subsidiary of Japan Energy Corporation. It is currently not engaged in any particular business.

Mitsubishi Corporation is a Japanese corporation which, as a general trading company, is engaged in a diversified range of businesses, including information technology, energy, metals, machinery, chemicals, food, textiles, clothing, lumber and paper. Mitsubishi International Corporation is a wholly owned subsidiary of Mitsubishi Corporation, a New York corporation. It too is a general trading company; its primary businesses are international trade involving commodities, consumer and industrial products; project management; and strategic finance and investment.

Mitsui & Co., Ltd. is a Japanese corporation. Mitsui & Co. (U.S.A.), Inc. is a New York corporation and a wholly owned subsidiary of Mitsui & Co., Ltd. Mitsui & Co., Ltd. and Mitsui & Co. (U.S.A.), Inc. are international trading companies and providers of business services.

Mitsui Engineering and Shipbuilding Co., Ltd. is a Japanese corporation engaged mainly in the business of designing, engineering, and manufacturing of ships, oceanographic equipment, steel structures, machinery, chemical and industrial facilities.

Mitsui O.S.K. Lines, Ltd. is a Japanese corporation that provides ocean and other transportation worldwide.

Nippon Steel Corporation is a Japanese corporation having its principal place of business in Tokyo, Japan. Nippon Steel U.S.A., Inc. is a Delaware corporation having its principal place of business in New York, and is a wholly owned subsidiary of Nippon Steel Corporation.

These companies have a vital interest in this case. Collectively, the companies are defending dozens of lawsuits brought pursuant to a California statute, Cal. Civ. Proc. Code § 354.6 ("Section 354.6"), that is part of the same broad statutory scheme by which California seeks to regulate the resolution of claims arising out of World War II, and which includes the insurance regulation at issue in this case, the Holocaust Victim Insurance Relief Act of 1999 ("HVIRA"), Cal. Ins. Code § 13800 *et seq.*. The constitutionality of Section 354.6 – which creates a cause of action for persons seeking damages for forced and slave labor during World War II – has been evaluated on many of the same bases as the HVIRA, with the Ninth Circuit recently holding Section 354.6 to be an unconstitutional infringement of the United States' exclusive power over war claims and the field of foreign affairs. Thus, the decision in this case may affect the litigation of claims premised on Section 354.6. Because of the importance of these issues to each of the companies, they seek leave to file this brief *amici curiae* in order to assist the Court in its consideration of the issues in this case.

Respectfully submitted,

WALTER DELLINGER
(*Counsel of Record*)
JOHN H. BEISNER
JOHN B. NIBLOCK
PAMMELA QUINN*
O'MELVENY & MYERS LLP
555 13th Street, N.W.
WASHINGTON, D.C. 20004
(202) 383-5300
*Admitted in Virginia only
Counsel for Amici Curiae Mitsubishi Materials Corporation and Mitsubishi Materials U.S.A. Corporation

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BRIEF OF MITSUBISHI MATERIAL CORPORATION ET AL. AS AMICI CURIAE IN SUPPORT OF PETITIONERS

Mitsubishi Materials Corporation, Mitsubishi Materials U.S.A. Corporation, Ishihara Sangyo Kaisha Ltd., Ishikawajima-Harima Heavy Industries Co., Ltd., IHI, Inc., Japan Energy Corporation, Irvine Scientific Sales Co., Inc., Japan Energy U.S.A., Mitsubishi Corporation, Mitsubishi International Corporation, Mitsui & Co., Ltd., Mitsui & Co. (U.S.A.), Inc., Mitsui Engineering and Shipbuilding Co., Ltd., Mitsui O.S.K. Lines, Ltd., Nippon Steel Corporation, and Nippon Steel U.S.A., Inc. respectfully submit this brief *amici curiae* in support of the petitioners in this case.[1]

INTEREST OF AMICI CURIAE

The interest of *amici curiae* is set forth in the foregoing Motion for Leave to File.

SUMMARY OF ARGUMENT

1. California's Holocaust Victim Insurance Relief Act of 1999 ("HVIRA") is part of a broad effort by the State of California to inject itself into U.S. foreign policy. Specifically, the HVIRA is part of a scheme to force the settlement of claims against allegedly unpaid insurance policies issued by European insurers to Europeans in the years leading up to and including World War II. California enacted this scheme in direct contravention of the express wishes of the United States and despite the federal government's pursuit of a ne-

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any petitioner or respondent authored this brief in whole or in part. No person or entity, other than *amici curiae*, made a monetary contribution to the preparation or submission of this brief.

gotiated resolution of such claims through an international commission.

Rather than working to resolve World War II claims through that commission, California proceeded to enact legislation creating *new* state-law claims, disregarding the danger that such claims might prompt companies to cease participating in the federally sponsored international commission. California's legislative effort ultimately encompassed several related measures, which collectively authorized persons to bring their time-barred World War II insurance claims, and established a system – including the public disclosure requirement directly at issue in this case – to compile the information to facilitate such claims. California eventually broadened the scheme by passing a companion statute creating a state-law cause of action for former U.S. prisoners of war and others subjected to forced labor during World War II.

The various provisions of these California efforts have generated much litigation. Courts have approached these cases in a variety of ways, most often concluding that the provisions are invalid.

2. California's statutory scheme violates the foreign affairs doctrine. It is well settled that States have no right to interfere with federal authority in the area of foreign affairs. State laws that do so disrupt the ability of the federal government to conduct foreign relations. Permitting California to enforce its insurance regulation – which regulates foreign insurance companies and does so as part of a broader effort to create causes of action against foreign corporations – would have the same undesirable effects on U.S. foreign policy that this Court held unconstitutional in cases such as *Zschernig v. Miller*.

California's comprehensive World War II legislative scheme, as well as the equally intrusive conduct of other

state and local governments in other areas of foreign affairs, demonstrates the need for this Court to reaffirm that the foreign affairs doctrine remains a vital constitutional principle. A clear statement by this Court as to how the *Zschernig* doctrine applies to statutes like the insurance regulation at issue and to related statutes, such as the cause of action provisions of the California scheme, would be of immeasurable assistance to those currently immersed in litigation brought about by California's World War II legislation.

3. The California scheme also violates principles of due process. It violates the fundamental prohibition against States' regulating conduct outside their borders. California has no connection with the underlying conduct it is seeking to regulate, which occurred in foreign countries by foreign nationals with no connection to California during the relevant time period. At no time prior to the enactment of California's scheme could any of the parties have foreseen that California law might govern any claims arising from their conduct.

4. No matter how the Court decides this case, it should be aware of the potential implications its decision might have for challenges to other, arguably more egregious provisions of the scheme. While a ruling in this case that the HVIRA is unconstitutional would almost surely invalidate the other provisions of the scheme *a fortiori*, those other provisions are, as the Ninth Circuit recently recognized, unconstitutional regardless of the outcome in this case.

Of course, the substantive merit of challenges to these other provisions is not before the Court here. However, because the decision in this case will be relied upon by courts and counsel litigating the constitutionality of these other, related California statutes, the Court should be aware of these cause-of-action-creating provisions in determining how to resolve the constitutional challenges to the HVIRA.

ARGUMENT

I. CALIFORNIA'S HOLOCAUST VICTIM INSURANCE RELIEF ACT IS PART OF A BROAD EFFORT BY STATES TO INJECT THEMSELVES INTO UNITED STATES FOREIGN POLICY.

A. The California Legislative Scheme.

In 1997, California launched its efforts to resolve claims arising from World War II. California was concerned about the issue of unpaid insurance claims discovered "in the course of researching Holocaust claims to European bank deposits."[2] S. Rules Comm., A.B. 600, Reg. Sess., at 3 (Cal. Sept. 2, 1999).

From the time the issue of unpaid insurance claims first arose, the United States advocated formal, mediated negotiations between the interested parties under the auspices of an international commission. The State Department believed

[2] California's decision to revive and enforce insurance claims for wholly foreign conduct arose initially out of private lawsuits asserting direct injury from the confiscation of assets by the government of Nazi Germany. These lawsuits – and subsequent congressional hearings and eventual settlement – opened the floodgates to numerous lawsuits asserting claims arising of actions taken by companies under the control of Nazi Germany and its allies during World War II.

Plaintiffs' lawyers supplemented their litigation efforts with equally vigorous efforts in legislative halls, lobbying state legislatures to create a variety of different statutory mechanisms for resurrecting and recovering on old claims against the distant corporate ancestors of today's deep pocket corporations. These lobbying efforts were particularly successful in California. Indeed, one of the main authors of the statute directly at issue in this case was a plaintiffs' lawyer, who crafted the legislation to eliminate some of the glaring problems with her cases. In these cases, counsel sought relief for torts committed over 50 years earlier in foreign countries with no connection to the state court venues in which she was bringing the claims. *See* Tom Tugend, *Slave Labor Bill Passed*, JEWISH J. OF GREATER L.A., July 23-29, 1999 (S.B. 1245).

that such a commission was the best way to balance its dual goals of "justice for Holocaust survivors and trying to avoid foreign policy tensions if sanctions are exercised against major [European-based] insurers." Henry Weinstein, *Hope Raised for Holocaust Claim Payouts*, L.A. TIMES, Apr. 14, 1999, at A3 [hereinafter Weinstein, *Hope Raised*] (quoting Undersecretary of State Stuart E. Eizenstat) (A.B. 600).[3]

The international commission was finally organized on August 25, 1998. *In re Assicurazioni Generali S.p.A. Holocaust Ins. Litig.*, 228 F. Supp. 2d 348, 353 (S.D.N.Y. 2002). Its purpose was to find a means of resolving all disputed insurance claims arising out of the Holocaust. *Id.* In October 1998, former Secretary of State Lawrence S. Eagleburger was chosen to chair the commission. "The 13-member commission is composed of representatives of the Israeli government, several Jewish organizations, several state insurance commissioners, including California Insurance Commissioner Chuck Quackenbush, and representatives of six European insurance companies that have been sued by Holocaust survivors and the heirs of Holocaust victims." *Holocaust Claims Panel Picks Leader*, L.A. TIMES, Oct. 22, 1998 (A.B. 1715).

Although California was a key participant in the international commission – sponsored by the United States, Germany, and others – it never fully supported the commission's mission. *See* Henry Weinstein, *5 Holocaust Survivors Sue German Firm Over Slave Labor*, L.A. TIMES, Mar. 6, 1999, at A15 (S.B. 1245) (noting that one of the insurance scheme's sponsors and coauthors, state Sen. Tom Hayden, "gave a critical review of the performance thus far of an in-

[3] Each of the newspaper articles cited herein are articles located in the legislative bill files of A.B. 1715 (1998), A.B. 600 (1999), and S.B. 1245 (1999). The applicable bill number is parenthetically indicated after each article, as above.

ternational commission that was created last year in an attempt to resolve the controversy over Holocaust-era insurance claims"); Weinstein, *Hope Raised*, *supra*, at A3 (describing constant "tensions between state and federal officials . . . over how best to reach agreements between Holocaust survivors and Swiss banks and German corporations").

Rather than work to *resolve* asserted World War II claims through the commission, California adopted the strategy of passing legislation creating *new* claims against insurance companies and others who had done business with the Nazi regime. The State Department objected to the legislation on the ground that it was incompatible with the federal policy for addressing these issues, but it was enacted nonetheless. *See* Letter from Tom Hayden, Cal. Sen., to Stuart Eizenstat, Undersecretary of State (June 3, 1999) (noting the State Department's criticism and expressing disagreement with the federal government's position). Ultimately, California enacted the insurance claims legislation notwithstanding concerns that the new laws "might prompt companies to cease their participation in the [federally supported international] commission process, thus possibly further delaying payments to elderly Holocaust survivors." Weinstein, *Hope Raised*, *supra*, at A3.

The legislative effort undertaken in California was designed to rival the scheme advocated by the federal government. The several measures collectively purport to provide a cause of action for insurance claims that could be filed through 2010, and establish a system by which plaintiffs would be able to compile the information necessary to facilitate the assertion of such claims.[4] *See* A.B. 1334, 1998 Assemb., Reg. Sess. (Cal. 1998); A.B. 1715, 1998 Assemb. Reg. Sess. (Cal. 1998); A.B. 600, 1999 Assemb., Reg. Sess. (Cal. 1999).

[4] The entirety of the scheme did not become law in 1998, when it was first passed by the legislature. Because the insurance disclosure regulation at issue in this case conflicted with another related bill, then-Governor Wilson vetoed the disclosure bill. Office of Ins. Advisor, Enrolled B. Rep., A.B. 1715, Reg. Sess., at 5 (Cal. 1998) ("If both bills [we]re signed, there would be two different code sections that give the Insurance Commissioner different instructions on when to revoke an insurer's certificate [of] authority."). The insurance disclosure provision (A.B. 600) passed the legislature again the following session and was signed into law by Governor Gray Davis.

The insurance regulation now before the Court serves the purpose of enabling potential claimants to obtain information needed to bring suit. The avowed aim of the provision was "to ensure that Holocaust survivors and their descendants obtain their rightful contractual compensation" from European insurance companies that had not paid claims by providing the public with the information necessary to reveal and prosecute a claim. Cal. Assemb. Ins. Comm., Assemb. Republican Bill Analysis, A.B. 1715, Reg. Sess., at 1 (Apr. 14, 1998).[5]

The entire insurance claims scheme became law on July 28, 1999, when Governor Gray Davis signed the public disclosure bill, A.B. 600. Assembly Bill 600 became the Holocaust Victim Insurance Relief Act of 1999 ("HVIRA"), Cal. Ins. Code §§ 13800 *et seq.*, the provision directly at issue here. This provision is important, but as noted, is part of a larger whole, whose true centerpiece is Cal. Civ. Proc. Code § 354.5(b) (1998), which provides that

[5] The legislation was aimed at the same European insurers who were targeted in lawsuits filed in the late 1990s, and who were also part of the United States' international commission initiative. Specifically, the companies at whom the regulation was aimed are "French, German, Italian and Swiss insurance companies" accused by California of "stalling and retaining as profits the money that should have been paid out to Holocaust victims and their heirs." Paul O'Donoghue, *Holocaust claim forms planned*, DAILY NEWS OF L.A., July 16, 1999, at 3 (A.B. 600).

> any Holocaust victim,[6] or heir or beneficiary of a Holocaust victim, who resides in this state and has a claim arising out of an insurance policy or policies purchased or in effect in Europe before 1945 from an insurer [that sold life, property, liability, health, annuities, dowry, educational, casualty, or any other insurance covering persons or property to persons in Europe at any time before 1945] may bring a legal action to recover on that claim in any superior court of the state for the county in which the plaintiff or one of the plaintiffs resides, which court shall be vested with jurisdiction over that action until its completion or resolution.

This centerpiece is effectuated by the statute of limitations provision, authorizing suits to be filed through December 31, 2010, Cal. Civ. Proc. Code § 354.5(c), and the public disclosure of information regarding unpaid insurance claims required by the HVIRA, *see* Cal. Ins. Code §§ 13800 *et seq.*

Concluding that it had not "done enough to punish [the] corporations"[7] that had aided Axis governments during World War II, the legislature quickly adopted additional legislation. The new provision of the World War II scheme created a state-law cause of action for former U.S. prisoners of war and others forced to work for private companies during World War II, despite the fact that all claims against Japan and its nationals had been explicitly settled and waived by the 1951 Treaty of Peace with Japan. Treaty of Peace with Japan, Sept. 8, 1951, art. 14(b), 3 U.S.T. 3169; *see also*

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[6] A "Holocaust victim" is defined as "any person who was persecuted during the period of 1929 to 1945, inclusive, by Nazi Germany, its allies, or sympathizers." *Id.* § 354.5(a)(1).

[7] See Cal. Sen. Tom Hayden, Floor Speech for S.B. 1245 (on file in legislative bill file of S.B. 1245).

infra pp. 16-17, note 13 (further discussion of Treaty of Peace).

The forced labor provision, Cal. Civ. Proc. Code § 354.6 (1999) ("Section 354.6") provides that

> [a]ny Second World War slave labor victim,[8] or heir of a Second World War slave labor victim, Second World War forced labor victim,[9] or heir of a Second World War forced labor victim, may bring an action to recover compensation for labor performed as a Second World War slave labor victim or Second World War forced labor victim from any entity or successor in interest thereof, for whom that labor was performed, either directly or through a subsidiary or affiliate. That action may be brought in a superior court of this state, which court shall have jurisdiction over that action until its completion or resolution.

Cal. Civ. Proc. Code § 354.6(b). The statute provides that claims brought under it may be brought until 2010. *Id.* § 354.6(c).

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[8] A "Second World War slave labor victim" is defined as "any person taken from a concentration camp or ghetto or diverted from transportation to a concentration camp or from a ghetto to perform labor without pay for any period of time between 1929 and 1945, by the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies and sympathizers." Cal. Civ. Proc. Code § 354.6(a)(1).

[9] A "Second World War forced labor victim" is defined as "any person who was a member of the civilian population conquered by the Nazi regime, its allies or sympathizers, or prisoner-of-war of the Nazi regime, its allies or sympathizers, forced to perform labor without pay for any period of time between 1929 and 1945, by the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies and sympathizers." Cal. Civ. Proc. Code § 354.6(a)(2).

B. Judicial Challenges to the Scheme.

All of these similar, related provisions were challenged in state and federal court under several legal theories. Although most courts concluded that these statutes were invalid for constitutional or other reasons, they differed in their approaches, and in some cases in their conclusions.

In the cases below, the Ninth Circuit concluded that the HVIRA did not violate the foreign affairs doctrine, *see Gerling Global Reinsurance Corp. of Am. v. Low*, 240 F.3d 739 (9th Cir. 2001), or principles of due process, *see Gerling Global Reinsurance Corp. of Am. v. Low*, 296 F.3d 832 (9th Cir. 2002). In so doing, it reversed the district court twice, which had concluded that the statute did both things. *See Gerling Global Reinsurance Corp. of Am. v. Low*, 186 F. Supp. 2d 1099 (E.D. Cal. 2001) (due process); *Gerling Global Reinsurance Corp. of Am. v. Quackenbush*, 2000 WL 777978 (E.D. Cal. June 9, 2000) (foreign affairs).

In comparison, the forced labor provision, Section 354.6, has been found more problematic than the HVIRA. For example, one district court, *Deutsch v. Turner Corp.*, 2000 WL 33957691 (C.D. Cal. Aug. 25, 2000), dismissed an action brought by a Holocaust slave labor victim on political question grounds.[10] Several decisions concluded that Section 354.6 ran afoul of the Treaty of Peace with Japan, which fully and finally resolved all wartime claims against Japan and its nationals. *See In re World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d 1153, 1157 (N.D. Cal. 2001) (Forced Labor (Filipinos)) (holding that the Treaty of Peace with Japan barred their claims for damages); *In re World War II Era Japanese Forced Labor Litig.*, 114 F.

[10] Likewise, *Alperin v. Vatican Bank*, 2003 WL 220434 (N.D. Cal. Jan. 3, 2003), and *Zivkovich v. Vatican Bank*, 2002 WL 31971730 (N.D. Cal. Aug. 23, 2002), held plaintiffs' claims, alleging injuries during World War II, were barred by the political question doctrine.

Supp. 2d 939 (N.D. Cal. 2000) (Forced Labor (Allied I)) (same); *see also Mitsubishi Materials Corp. v. Superior Court*, 2003 WL 253877 (Cal. App. 4th Feb. 6, 2003) (same). In another Northern District of California decision, the court concluded that Section 354.6 was an unconstitutional intrusion on the exclusive foreign affairs power of the United States. *In re World War II Era Japanese Forced Labor Litig.*, 114 F. Supp. 2d 1160, 1178 (N.D. Cal. 2001) (Forced Labor (Ailied II)) (discussing forced labor claims by Korean and Chinese civilians).

The Ninth Circuit affirmed all of these district court holdings on the grounds that the forced labor provision is an unconstitutional exercise of foreign affairs power. *See Deutsch v. Turner Corp.*, 317 F.3d 1005 (9th Cir. 2003). The *Deutsch* court held that Section 354.6 is an unconstitutional violation of the United States' exclusive power to make foreign policy and decide the terms on which wars and war claims are to be resolved. The court also expressed doubts as to whether the provisions setting forth a new statute of limitations – which "would actually revive claims that been previously time-barred, thus upsetting the repose of potential defendants" – comported with due process. *See id.* at 1020 n.4.

The *Deutsch* decision was announced just days after one California court of appeal rejected the views of the United States that claims under Section 354.6 could not be decided by California courts and allowed to go forward alleged forced labor suits brought by persons of Korean and Japanese origin. *See Taiheiyo Cement Corp. v. Superior Court*, 129 Cal. Rptr. 2d 451 (Cal. App. 2d 2003). In direct contradiction to the Ninth Circuit's opinion in *Deutsch*, the court of appeal rejected the defense based on the foreign relations preemption doctrine. *See* 129 Cal. Rptr. at 472. The court of appeal also rejected defendants' due process and political-question arguments. *See id.* Yet, just a few weeks later, another California court of appeal concluded that such

other California court of appeal concluded that such claims could not proceed, on the ground that claims of Allied prisoners of war are barred by the 1951 Treaty of Peace with Japan. *See Mitsubishi Materials Corp. v. Superior Court*, 2003 WL 253877 (Cal. App. 4th Feb. 6, 2003) (holding that the Treaty of Peace with Japan barred their claims for damages).

C. Other State Legislation Providing Claims for World War II Injuries.

At roughly the same time that the first provision of the California scheme was enacted, Florida's Holocaust Victims Insurance Act (FHVIA) also took effect. *See Gerling Global Reinsurance Corp. of Am. v. Gallagher*, 267 F.3d 1228, 1229 (11th Cir. 2001). Like California's HVIRA, the FHVIA required each insurer doing business in Florida to publicize information regarding policies issued by its affiliates in Europe between 1920 and 1945. *See id.* at 1229-30. The public disclosure requirement of the Florida statute, along with a provision "creat[ing] a new ten-year statute of limitations for the presentation of [such] claims," facilitated the bringing of a private cause of action by individuals seeking damages for the non-payment of a Holocaust-era policy. *Id.* at 1230. "Accordingly, a Florida insurer could be liable . . . based upon the non-payment of a Holocaust-era policy by a separate foreign company that it does not control, but with which it happens to be affiliated." *Id.* at 1230-31.

Although Florida's scheme was invalidated on due process grounds by the Eleventh Circuit, *Gallagher*, 267 F.3d at 1229, several other States also have enacted statutes containing provisions similar to the HVIRA and the FHVIA. *See, e.g.*, Ariz. Rev. Stat. §§ 20-490 *et seq.* (2002); Md. Code Ann., Ins. §§ 28-101 *et seq.* (1999); Minn. Stat. § 60A.053 (2000); N.Y. Ins. Law §§ 2701 *et seq.* (1998); Tex. Ins. Code Ann. § 21.74 (2001); Wash. Rev. Code §§ 48.104.010 *et seq.* (1999). The Arizona statute was enacted soon after the

Ninth Circuit's decision below, upholding the HVIRA against constitutional challenge. Thus, if this Court were to affirm the Ninth Circuit, European insurers and their affiliates may be forced to determine whether to continue doing business in at least eight States – and possibly many more.

II. CALIFORNIA'S STATUTORY SCHEME IS AN UNCONSTITUTIONAL INTRUSION INTO FOREIGN AFFAIRS.

A. California's Statutory Scheme Is Unconstitutional Under the Foreign Affairs Doctrine Articulated by This Court.

It has been well settled since this nation's founding that the resolution of war claims is exclusively the responsibility of the *federal* government to address, through treaties, state-to-state agreements, or otherwise. *See Ware v. Hylton*, 3 U.S. (Dall.) 199, 230 (1796). "Power over external affairs is not shared by the States; it is vested in the national government exclusively." *United States v. Pink*, 315 U.S. 203, 233 (1942). States have neither the power nor the right to interfere with the federal priority in this area. *See Stewart v. Kahn*, 78 U.S. 493, 506-07 (1871) (States cannot interfere with federal war- and peace-making powers, which include the power to "remedy the evils which have arisen from [a war's] rise and progress").

Indeed, "*all* [foreign policy] responsibility is reposed at the national level rather than dispersed among the states and localities." 1 Laurence H. Tribe, *American Constitutional Law* §§ 4-5 (3d ed. 2000). The exclusivity of federal power over foreign affairs is crucial to our system of government: "The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it." *The Federalist No. 80* (Alexander Hamilton). It is clear that matters concerning war are part of the

"inner core" of the foreign relations power that is denied to the States. *Deutsch*, 317 F.3d at 1022.[11]

This Court has long held that the foreign affairs powers specified in the Constitution reflect the general principle that power over foreign affairs is reserved to the federal government. *See, e.g., Pink*, 315 U.S. at 233; *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889) (*The Chinese Exclusion Case*). The Court most recently confirmed this bedrock principle in *Zschernig v. Miller*, holding that state law "must give way" if it "impair[s] the effective exercise of the Nation's foreign policy." 389 U.S. 429, 440 (1968); *see also Kolovrat v. Oregon*, 366 U.S. 187, 198 (1961); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941). Accordingly, in *Zschernig*, this Court invalidated an Oregon statute preventing nonresident aliens from inheriting property unless they could prove that U.S. citizens had a reciprocal right to inherit property in their home country. 389 U.S. at 430-31 & n.1.

Specifically, the Court noted that application of the Oregon statute and similar state laws had "led [to] minute inquiries [by the States] concerning the actual administration of foreign law, into the credibility of foreign diplomatic statements," and other foreign affairs matters. *Id.* at 435. Noting that "foreign affairs and international relations [are] matters

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[11] As the *Deutsch* court noted:

> Of the eleven clauses of the Constitution granting foreign affairs powers to the President and Congress . . ., seven concern preparing for war, declaring war, waging war, or settling war. Most of the Constitution's express limitations on state's foreign affairs powers also concern war. Even those foreign affairs powers in the Constitution that do not expressly concern war and its resolution may be understood, in part, as a design to *prevent* war. Indeed, as the *Federalist* shows, supporters of the new Constitution believed that disunity in international affairs risked unnecessary war. *See, e.g., The Federalist No. 3*, at 13 (Clinton Rossiter ed. 1961).

317 F.2d at 1022-23.

which the Constitution entrusts solely to the Federal Government," *id.* at 436, the Court found it "inescapable" that the law, as applied, "affects international relations in a persistent and subtle way," *id.* at 440, has "more than 'some incidental or indirect effect on foreign countries,'" and creates "great potential for disruption or embarrassment," *id.* at 434-35 (citation omitted), and was therefore an unconstitutional exercise of the exclusively federal foreign affairs powers.

Permitting California to enforce its legislative scheme against European and Japanese corporations for conduct committed in countries under the rule of "the Nazi regime" during World War II would have precisely such undesirable effects. The California statutory scheme is a regulation of foreign affairs by a State in both purpose and effect. As both its language and legislative history make clear, California's World War II claims legislation represents an attempt by California to forge its own settlement of World War II-era claims in a manner that is contrary to the federal government's exclusive power to conduct foreign relations. Indeed, the principal sponsor of Section 354.6 stated that he introduced the legislation to force the United States to deal with Holocaust claims in a manner pleasing to *California's* foreign policy view.[12] *See infra* note 16.

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[12] California has repeatedly ignored the United States' views. Even after the legislature decided to proceed with enactment of the World War II scheme in the face of expressed concerns from the federal government, the United States told California courts of such concerns and of the conflict between the California statute and United States aims and views, including those underlying its post-war treaties and 50 years of subsequent foreign policy. At least three state courts have felt free to ignore those views. *See Taiheiyo Cement Corp. v. Superior Ct.*, 129 Cal. Rptr. 2d 451 (Cal. App. 2d 2003), *affirming Jeong v. Onoda Cement Co.*, No. BC 217805, slip op. at 11 (Cal. Super. Ct. Nov. 29, 2001) (disparaging U.S. statement of interest and holding that U.S. foreign policy, "if it is a policy, appears to be legally unsupportable"); *In re Japanese P.O.W. Cases*, Jud. Coun. Coord. Proc. No. 4153, slip op. at 2 (Cal. Super. Ct.

For over 50 years, the federal government has utilized diplomatic means to negotiate the resolution of World War II-era claims on behalf of the United States.[13] California enacted its own statutory scheme knowing full well that the threat of tort liability could directly influence federal foreign policy. *See* Weinstein, *Hope Raised*, *supra*, at A3 (A.B. 600).

Indeed, various provisions of that scheme have an impact on U.S. foreign relations that is much more than "incidental or indirect." For example, the Treaty of Peace with Japan – which the United States was largely responsible for drafting and negotiating and which was designed to effectuate U.S. foreign policy for Asia that endures to the present day, *see, e.g.*, Br. of United States at 16-17, *Suk Yoon Kim v. Ishkawajima Harima Heavy Indus. Co., Ltd.*, Nos. 01-17197 *et al.* (9th Cir. filed June 6, 2002) – explicitly settles and waives all claims of the Allied governments and their nationals against Japan and its nationals, provides a mechanism for

Oct. 19, 2001) (rejecting State Department's views on Peace Treaty with Japan), *rev'd*, *Mitsubishi Materials Corp. v. Superior Ct.*, 2003 WL 253877 (Cal. App. 4th Feb. 6, 2003). In so doing, those courts have ignored this Court's decisions requiring deference to the United States' views. *See, e.g.*, *Sumitomo Shoji Am. v. Avagliano*, 457 U.S. 176, 184-85 (1982); *see also In re Aircrash in Bali*, 684 F.2d 1301, 1309 (9th Cir. 1982) (courts must "studiously avoid imposing [their] own view[s] of foreign policy objectives and must accept the foreign policy formulations of the executive").

[13] The most striking and successful effort is reflected in the Treaty of Peace – negotiated by the United States among its allies and Japan – which fully and finally settled all war-related claims between the United States, the other Allies, and Japan, as well as all their nationals. Although the Cold War prevented a final peace treaty with Germany, the United States policy for nearly 50 years was effected in a series of treaties and international agreements dealing with World War II claims against Germany and its nationals. *See Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 447-56 (D.N.J. 1999); *Burger-Fischer v. Degussa*, 65 F. Supp. 2d 248, 255-60 (D.N.J. 1999).

compensating POWs, and dictates that claims of Korea and China and their nationals are to be settled through government-to-government arrangements, not lawsuits in U.S. courts. *See* Treaty of Peace with Japan, Sept. 8, 1951, art. 4(c), 14(b), 3 U.S.T. 3169. California has attempted to subvert this international agreement through the forced labor provision, which purports to provide a cause of action for former U.S. military personnel and others held captive and forced to labor in Axis-occupied territory during World War II. Cal. Civ. Proc. Code § 354.6.

The United States has taken the position that such lawsuits threaten to have a "serious negative impact on U.S.-Japan relations," Statement of Interest of United States at 34, *In re World War II Era Japanese Forced Labor Cases* (Allied II), MDL No. 1347 VRW (N.D. Cal. filed Dec. 6, 2000), and Japan has observed that these lawsuits are "detrimental to bilateral relations between our two countries." *The Views of the Government of Japan on the Laws Against Japanese Companies by Former American Prisoners of War and Others* at 2 (*Note Verbale* from Embassy of Japan to U.S. Dept. of State, Aug. 8, 2000) [hereinafter *Note Verbale*] (cited by. Thus, there can be no doubt that Section 354.6 undermines the credibility of the United States as a treaty partner, threatening "great . . . disruption or embarrassment" for the national government. *Zschernig*, 389 U.S. at 434-35. It is difficult to imagine how state legislation could intrude more directly on the federal government's foreign affairs power than by creating a cause of action permitting claims previously settled by treaty, implicitly overturning the very terms on which the war was concluded.

In addition, California's World War II legislation affects U.S. foreign relations by singling out for differential treatment not just Japan, but also Germany and other European nations. The California scheme targets these countries because it focuses only on conduct involving Axis govern-

ments during World War II, but ignores insurance fraud and forced labor practices perpetrated by other countries or during other eras. The United States, Germany, Switzerland, and Japan have all agreed that the scheme at issue threatens to damage relations between the United States and each of these countries. *See* Br. of United States in Support of Pet. at 17-18; *Note Verbale*, *supra*, at 2. Singling out disfavored foreign regimes is just the kind of interference with U.S. foreign policy that *Zschernig* condemned.[14]

This statutory scheme is a pronouncement of the foreign policy of the State of California.[15] That, in and of itself, is beyond any State's constitutional jurisdiction. It is all the more so where the State's foreign policy contradicts the longstanding foreign policy of the United States – here, the position that resolution of World War II-era claims is to be handled through negotiations, rather than private lawsuits in state or federal courts. *See, e.g.*, Br. of United States in Support of Pet. at 16; Br. of Gov't of Switzerland in Support of Pet. at 6-7; Br. of Federal Rep. Of Germany in Support of

[14] Such discrimination is also a hallmark of unconstitutional retroactive legislation, yet another reason – apart from those articulated *infra* Section II – that the California scheme violates due process. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994) ("[P]olitical pressures pose[] a risk that . . . retroactive legislation [may be used] as a means of retribution against unpopular groups."). By subjecting European and Japanese companies to potentially massive new liability for war-related conduct more than 50 years after the fact, the scheme "attaches a new legal consequence to events completed before its enactment." *Id.* at 270. Moreover, the new legal consequence is "substantial and potentially far-reaching." *Eastern Enters. v. Apfel*, 524 U.S. 498, 534 (1998).

[15] Indeed, a California judge actually chastised the United States for interfering with *California*'s foreign policy by challenging Cal. Civ. Proc. Code § 354.6: "Why is the United States now trying to put pressure on the state of California? . . . *Why are you interfering with our foreign policy?*" *Jeong v. Onoda Cement Co.*, No. BC 217805, Tr. at 21 (Cal. Super. Ct. Nov. 7, 2001) (emphasis added).

Pet. at 7. "[T]he use of subnational government authority to pursue agendas that directly contradict U.S. foreign policy is far too dangerous and simply cannot be condoned." Earl H. Fry, *The Expanding Role of State and Local Governments in U.S. Foreign Affairs* 132 (1998). This threat has rarely been more apparent than it is in the context of this and similar statutory schemes.

B. The Continuing Importance of the Foreign Affairs Doctrine.

States and localities have become "bolder than ever" when it comes to injecting themselves into issues of foreign policy. Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127, 1130 (2000). During the past decade, they have enacted numerous statutes relating to U.S. foreign policy.[16] This trend only underscores the need for a continued – even

[16] For example, apart from the regulation and related legislation involved in this case and the numerous similar statutes enacted in a variety of states, *see supra* p. 12, the California legislature enacted a statute authorizing California state courts to hear suits seeking premiums on Armenian genocide-era insurance policies, despite forum-selection clauses in the policies, and extending the applicable statute of limitations through 2010. *See* Cal. Civ. Proc. Code § 354.4 (2000). Other high-profile state involvement in foreign affairs includes, for example, the recent enactment by Massachusetts, along with other states and localities, of "Burma laws," which restricted the ability of the state and its agencies to purchase from companies doing business with Burma (Myanmar). *See Crosby v. National Foreign Trade Council*, 530 U.S. 363, 366-67, 371 n.5 (2000).

Localities too have become embroiled in foreign affairs. For example, in response to the allegations of Holocaust-era asset laundering, "New York City's comptroller . . . banned certain Swiss banks from bidding on billions of dollars in bond offerings and other contracts sponsored by their respective agencies," despite the fact that "[t]hese bans have been severely criticized by the U.S. Department of State." Earl H. Fry, *The Expanding Role of State and Local Governments in U.S. Foreign Affairs* 5 (1998).

revitalized – doctrine circumscribing the tendency of States and localities to assert authority where they have none. "[T]he need for clear boundaries in which a state may permissibly regulate and legislate becomes essential." Todd Jascott, *Reemergence of the Zschernig Doctrines and the Foreign Affairs Powers as a Limit on a State's Power to Act*, 10 TULANE J. INT'L & COMP. L. 423, 444 (2002).

Except for the decision below, federal courts have uniformly agreed that state World War II claims recovery statutes are unconstitutional. But there has been disagreement as to why. A clear statement by this Court of how the *Zschernig* doctrine applies to such statutes would be of immeasurable assistance to the lower courts, counsel, and companies involved in World War II claims litigation throughout the federal and state judicial systems. Such clarity would also be of service to plaintiffs pursuing claims under such statutes. As one court has noted, "[i]t would be a disservice to [the] heroes of World War II to create the false hope of some sort of monetary recovery" based on state statutes that are constitutionally infirm. *Mitsubishi Materials Corp.*, 2003 WL 253877, at *1.

III. THE CALIFORNIA SCHEME IS AN EXERCISE OF EXTRATERRITORIAL JURISDICTION THAT VIOLATES PRINCIPLES OF DUE PROCESS.

It is axiomatic that States may not regulate conduct occurring entirely outside of their borders. Thus, where "a State has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 310-11 (1981) (plurality); *id.* at 333 (Powell, J., dissenting); *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1985) (State "may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them") (quoting *Home Ins. Co. v. Dick*, 281 U.S. 397,

410 (1930)); *Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66, 70 (1954) ("[A] state is without power to . . . regulate and control activities wholly beyond its boundaries."). Consistent with this principle, the Court in *Shutts* held that Kansas could not constitutionally apply its laws to claims arising from transactions conducted between parties who were not Kansas residents, and who had no connection to the State. 472 U.S. at 821-22. Instead, the Court held that "Kansas must have a 'significant contact or aggregation of contacts' to the claims . . ., contacts 'creating state interests,' in order to ensure that the choice of Kansas law is not arbitrary or unfair." 472 U.S. 797, 821 (1985) (quoting *Hague*, 449 U.S. at 312-13). A touchstone of this fairness inquiry is "the expectation of the parties." *Id.* at 822.

The Court has made clear that in order to constitutionally regulate conduct, a State must have sufficient contacts both with the parties and with the underlying subject matter being regulated. *See Hague*, 449 U.S. at 310-11 (State cannot constitutionally apply its law if it "has only an insignificant contact with the parties *and the occurrence or transaction*") (emphasis added); *accord Gallagher*, 267 F.3d at 1238 ("[W]e must look not only at whether the parties regulated by the Act have contacts with Florida, but also and more importantly here at whether the subject about which this Act seeks information has a sufficient nexus to Florida.").

Through its World War II compensation scheme – which purports to create new causes of action for claims arising out of World War II, extend the statute of limitations on such claims, and facilitate the bringing of certain of these claims through the required public disclosure by foreign companies of certain types of information – California has attempted to regulate a subject matter with which it has no relationship – namely, conduct by citizens of European and Asian countries that occurred solely in Europe and Asia before and during World War II. This conduct and these actions had no con-

nection to California at the time, and at no time prior to the enactment of California's World War II reparations scheme could any of the foreign companies have foreseen that California law might govern their conduct.

The Ninth Circuit (Pet. App. 20a) held that California has an interest sufficient to support the HVIRA provision because, that court believed, that provision is merely a disclosure requirement, directly applicable only to California insurers. This is quite wrong. The overriding purpose of the HVIRA – and the World War II scheme generally – is to identify and facilitate (*i.e.*, to regulate) the payment of claims arising out of World War II-era conduct in foreign countries.[17] The specific statutory provision at issue cannot be

[17] In the courts below, the Commissioner attempted to defend the HVIRA by asserting that California had "other legitimate purposes for the statute, such as informing California residents about potentially valid claims and about the character of the family of companies with whom they might contract for insurance." Pet. App. 16a. These eleventh-hour justifications find no support in the statutory language or the legislative history and do nothing to undermine the conclusion that California is attempting to regulate extraterritorial conduct.

As the Court recently reaffirmed, "[w]e ascertain the purpose of a statute by drawing logical conclusions from its text, structure, and operation." *Nguyen v. INS*, 533 U.S. 53, 67-68 (2001). Accordingly, subsequent restatements of the statutes' purposes by the Commissioner cannot overcome the explicit language of the legislation itself. *Id.* ("Statements from the government's brief are not conclusive as to the objects of the statute, however, as we are concerned with the objectives of Congress, not those of the INS."); *see also Gallagher*, 267 F.3d at 1239-40 (rejecting similar attempt by Florida Commissioner because that position "[could not] be squared with the Legislature's own unequivocal statement of its purpose").

Here, the text, structure, and operation of the scheme make plain that its sole purpose is to identify and facilitate payment of World War II-era claims. The HVIRA provides that "the department has an affirmative duty to play an independent role in representing the interests of Holocaust survivors" (Pet. App. 115a), and insurance companies have a responsibility to "ensure the rapid resolution of these [unpaid policy

assessed in a vacuum, divorced from its context. Rather, it must be viewed as part and parcel of a comprehensive legislative scheme. *See De Veau v. Braisted*, 363 U.S. 144, 147 (1960) ("Due consideration of the constitutional claims that are made requires that [this section] be placed in the context of the structure and history of the legislation of which it is a part."); *see also New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 115 (1978) (Stevens, J., dissenting) ("[I]t is necessary to review the statutory scheme as a whole, to identify the purpose of the specific provision challenged in this case, and to explain the actual operation of that provision.").

Plainly, California's statutory scheme is intended to secure compensation for victims of conduct by foreign governments and nationals that took place in foreign countries more than half a century ago during a world war. California plainly has no serious interest *specific to California* in regulating such conduct. The only parties and conduct currently involved are the foreign companies who assertedly refuse claims made by persons seeking compensation for alleged injuries that occurred in Europe or Asia during World War II. Yet, California had no contact with that conduct during the war, and thus has no constitutionally valid interest in promulgating the regulation.

Even with respect to the HVIRA provision itself, there can be no legitimate dispute that the essential *effect* of the HVIRA is to regulate *European* insurance companies, by

claims], eliminating the further victimization of these policyholders and their families (Cal. Ins. Code § 13801(e); Pet. App. 119a). In addition, the legislature found that the HVIRA is "necessary to protect the claims and interests of California residents, as well as to encourage the development of a resolution to these issues through the international process or through direct action by the State of California, as necessary." *Id.* § 13801(f); Pet. App. 119a. This background reveals that purpose of HVIRA was to identify and facilitate the payment of World War II-era claims in California and nothing more.

forcing them to disclose information that will facilitate the bringing of insurance claims on unpaid World War II-era policies.[18] The Eleventh Circuit correctly recognized that fact in determining that the Florida counterpart of the HVIRA infringed due process rights. *Gallagher*, 267 F.3d at 1238 (referring to Florida insurers as "the (nominally) regulated parties"). Without question, California's scheme imposes de facto regulation on foreign companies that have no connection to the State. Thus, the "practical effect" of the legislation is to compel "conduct beyond the boundaries of the State." *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989).

That extraterritorial regulatory effect is also plainly the law's central *purpose*. In enacting the HVIRA, California principally sought to force payment on the underlying claims of World War II-era victims against European insurance companies, not to affect the insurance behavior of California insurance companies. *See* Pet. App. 115a (statute seeks "to ensure the rapid resolution of these [claims]"). The *Gallagher* court explicitly recognized that reality, noting that "[t]he reporting provisions pertain to, and as a practical matter unquestionably seek to regulate, a subject matter – the European affiliates' payment or non-payment of Holocaust-era policy claims – with no jurisdictionally significant relationship to Florida." 267 F.3d at 1238.[19] In short, when viewed in its full context – as it must be – neither the parties[20] nor the conduct that is the true subject of regulation

[18] Likewise, the targets of the forced labor provisions are World War II-era European and Asian companies and their successors. Cal. Civ. Proc. Code § 354.6(b).

[19] The forced labor provisions similarly seek to facilitate compensation for conduct that took place entirely in Europe and Asia.

[20] The fact that some plaintiffs have since moved to California does not provide sufficient contacts to warrant extension of California law to claims arising at least 55 years earlier in foreign countries. *See, e.g.*, *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178 (1936); *Home Ins. v. Dick*, 281 U.S. 397, 408 (1930); *McCluney v. Jos. Schlitz Brewing Co.*, 649 F.2d 578, 583-84 (8th Cir. 1981); *see also Shutts*, 472 U.S. at 821 ("[W]hile a State may . . . assume jurisdiction over the claims of [parties] whose principal contacts are with other States, it may not use this assumption of jurisdiction as an added weight in the scale when considering the permissible constitutional limits on choice of substantive law."); *Hague*, 449 U.S. at 319 (plurality) (a subsequent change of residence to the forum State "insufficient in and of itself to confer power on the forum State to choose its law").

have a sufficient nexus with California to permit the sort of extraterritorial regulation at issue here.

Moreover, even if the Court, viewing the HVIRA in isolation, views it as "only" a disclosure regulation, that hardly means that it does not regulate foreign companies. *See Dole v. United Steelworkers of Am.*, 494 U.S. 26, 28 (1990) (disclosure requirements are among available "regulatory tools"); *see also United States v. O'Hagan*, 521 U.S. 642, 668 (1997) (Congress may design a statute "to make 'disclosure … the preferred method of market regulation.'") (quoting *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1 (1985)); *BMW v. Gore*, 517 U.S. 559, 570-71 (1996). The Ninth Circuit itself recognized that "[s]eeking information from insurers about their claims-paying record, to be used in the licensing process, is a form of regulating the business of insurance." Pet. App. 45a n.3. No matter how it is viewed, the California scheme attempts to export state law to govern claims and parties that bear no relation whatever to California, thus violating principles of due process.

IV. EVEN IF IT AFFIRMS THE JUDGMENT BELOW, THE COURT SHOULD BE CAREFUL NOT TO ENDORSE THE ENTIRE WORLD WAR II SCHEME AND SCHEMES LIKE IT.

The foregoing constitutional arguments apply as well to the remaining provisions of the California scheme creating causes of action for insurance and forced labor claims. Re-

gardless of how it rules in this case, the Court must be aware of the interconnections and distinctions among all of these provisions, and make its judgment about the HVIRA with appropriate care for the effects of that judgment on these other provisions.

As an initial matter, if the HVIRA is an unconstitutional exercise of foreign affairs power or a violation of due process, then the private causes of action provisions are invalid *a fortiori*. But even if the Court concludes that the HVIRA itself does not violate the foreign affairs doctrine or principles of due process, the private cause of action provisions of the California scheme would still be unconstitutional under each of those theories. Even the Ninth Circuit recognized that the forced and slave labor provision, Section 354.6, is a more extreme exercise of state power than the HVIRA and that Section 354.6 is unconstitutional even if the HVIRA is not. *See Deutsch*, 317 F.3d at 1019-20. As the Ninth Circuit recognized in holding Section 354.6 unconstitutional, if the HVIRA is construed to have the scope and effect attributed to it by the Ninth Circuit in the case now before the Court, the differences between such cause-of-action provisions and the HVIRA are constitutionally significant. *See Deutsch*, 317 F.3d at 1020 n.4.

The forced and slave labor provision (Section 354.6), like the cause of action provision of the insurance scheme (Cal. Civ. Proc. Code § 354.5), is unconstitutional even if the HVIRA is not. No plausible argument can be made that creating judicial remedies for World War II conduct by persons having no connection with California, and which arose out of the State (indeed out of the country), are "traditional state regulation" with only an "incidental or indirect" impact on

foreign policy. Thus, such policies are an unconstitutional exercise of state power.[21]

Obviously, the Court need not concern itself with the substantive merit of challenges to the cause of actions provisions of the California statutory scheme, which are not before it at this time. But because its decision in this case will certainly be looked to by courts and parties in litigation involving such statutes, it is essential for the Court to be aware of those provisions when addressing the issues raised by the HVIRA.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

WALTER DELLINGER
(*Counsel of Record*)
JOHN H. BEISNER
JOHN B. NIBLOCK
PAMMELA QUINN*
O'MELVENY & MYERS LLP
555 13th Street, N.W.
WASHINGTON, D.C. 20543
(202) 383-5300
*Admitted in Virginia only

[21] While *Deutsch* did not explicitly reach the due process question, the cause of action provisions also violate due process. Indeed, because the cause of action provisions are directly applicable only against foreign companies (or their recently formed U.S. subsidiaries), they regulate out-of-state conduct even more exclusively and directly than HVIRA, which achieves the same result through direct regulation of affiliated companies that do business in California.

DAVID M. BALABANIAN
BINGHAM MCCUTCHEN LLP
Three Embarcadero Center
SAN FRANCISCO, CA 94111
(415) 393-2000

NATHAN LANE III
JOSEPH A. MECKES
SQUIRE, SANDERS & DEMPSEY LLP
One Maritime Plaza, Suite 300
SAN FRANCISCO, CA 94111
(415) 954-0200

KATHRYN DAVIS
MORRISON & FOERSTER LLP
425 Market Street
SAN FRANCISCO, CA 94107
(415) 268-7000

ARNE D. WAGNER
MORRISON & FOERSTER LLP
425 Market Street
SAN FRANCISCO, CA 94107
(415) 268-7000

MARGARET K. PFEIFFER
STACY R. STOLLER
SULLIVAN & CROMWELL LLP
125 Broad Street
NEW YORK, NY 10004
(212) 558-4000

PAUL J. HALL
ERIK K. LARSON
NIXON PEABODY LLP
Two Embarcadero Center, 27th Fl.
SAN FRANCISCO, CA 94111
(415) 984-8200

JUNJI MASUDA
MASUDA & EJIRI
399 Park Avenue, 18th Fl.
NEW YORK, NY 10022
(212) 486-2525

Attorneys for Amici Curiae

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